

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SCILAYR W. SHELTON

Claimant

V.

FREDERICK WATERPROOFING

Respondent

AND

**TRAVELERS PROPERTY CASUALTY
CO. OF AMERICA**

Insurance Carrier

Docket No. 1,075,179

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the February 10, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. R. Todd King of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 26, 2016, preliminary hearing and exhibits thereto; the transcript of the October 12, 2015, discovery deposition of claimant; the transcript of the October 12, 2015, discovery deposition of Freddy Burks; and all pleadings contained in the administrative file.

ISSUE

On August 7, 2015, claimant fell off a ladder while working for respondent. Claimant, who suffers from epileptic seizures, alleged he slipped on a ladder rung and fell. Respondent contends claimant's fall is not compensable because it was caused by an epileptic seizure, a personal condition.

The ALJ found:

The question in the case is what caused the fall. If the fall was caused by the Claimant slipping, then the accident arose out of the Claimant's employment

and the case is compensable. If the fall was caused by an epileptic seizure, then it was caused by a personal condition and did not arise out of and in the course of the Claimant's employment. See K.S.A. 44-508(f)(3)(A)(iii) and *Raul Hurtado, Jr. v. I & A Painting and Remodeling*, No 1,058,894 (Kan. WCAB, Dec. 22, 2015).

This case is factually distinguishable from *Hurtado*. In *Hurtado*, there was no question the Claimant had a seizure while working on a ladder. In the present case, there is a fact question as to whether or not the Claimant had a seizure while on the ladder.

The Court has reviewed all of the evidence submitted by the parties. The Court finds that it is more likely than not that the Claimant fell as a result of slipping on the ladder and is entitled to workers compensation benefits.¹

Respondent appeals for reasons set forth above. Claimant asks the Board to affirm the preliminary hearing Order.

The issue is: did claimant's accidental injury arise out of and in the course of his employment?

FINDINGS OF FACT

Claimant was diagnosed with epilepsy in 1999. When he testified in October 2015, the last time claimant went to the hospital because of his epilepsy was approximately a month before his work accident. On that occasion, he fell when getting out of a car, started having a seizure and was taken by ambulance to the emergency room. Claimant testified that most of the time, but not always, he can tell when a seizure is coming because he has tremors, jerks and twitches. His seizures can happen when he is tired, afraid or not on his medication. The seizures generally last two to three minutes, but sometimes longer.

After a seizure, claimant remembers only bits and pieces of what is happening. It may be two months between claimant's seizures or they may occur more frequently. Claimant has not filled his anti-seizure medication, Depakote, on a regular basis because respondent does not provide health insurance and he cannot afford it. Before his work accident, he last took his medication approximately one week prior to the accident.

Because of his seizures, claimant does not have a driver's license. On one occasion, while driving without a license, claimant had a seizure, struck a telephone pole and underwent surgery to remove part of his intestines.

¹ ALJ Order at 1-2.

Claimant has worked for respondent off and on since 2006, and most recently since October 2014. He started out roofing, but now mainly waterproofs buildings and parking lots.

Claimant testified that on August 7, 2015,² he was working in Argonia on a remodeling job. Claimant indicated he was instructed to paint a second-story window quickly, so a storm window could be installed over the window he was painting. Claimant used a 30-foot extension ladder to paint the window. Claimant placed the ladder to the left of the window. In order not to move the ladder, he reached out too far to paint the right side of the window, his right foot slipped off the ladder and he fell. Claimant estimated he was 25 feet above the ground when he fell. He remembers falling backwards and yelling. A co-worker, Larry Gilkey, told claimant he heard him holler when he fell and came running over.

Claimant's next memory was waking up with co-workers around him. Claimant's back hurt and no one would allow him to get up or turn his neck. An ambulance was called and claimant was transported to the hospital. Claimant testified he sustained a broken back, broken jaw, fractured ribs, punctured lung and a broken right eye socket. He did not remember being interviewed while in the hospital by an insurance adjustor.

Claimant did not believe he had a seizure while on the ladder, because he remembered falling from the ladder. If he had a seizure, it was after hitting the ground.

Claimant indicated he has had seizures in the past when working for respondent, including a couple of seizures during the current period he worked for respondent. He has discussed his epilepsy with his supervisor, Freddy Burks. According to claimant, Mr. Burks did not want him on ladders or high machinery. However, claimant indicated he was instructed to get on ladders by Mr. Burks. On the day of the accident, he was instructed by Mr. Burks to get on the ladder and paint the window. Claimant admitted he never told Mr. Burks he should not work on a ladder.

Mr. Gilkey testified he was aware claimant had seizures and previously observed him having seizures at work. Mr. Gilkey indicated he discussed with Marcus Burks, Freddy Burks' father and respondent's owner, about Marcus Burks not wanting claimant to be on ladders. On the day claimant fell, Mr. Gilkey did not instruct claimant to get on the ladder. He testified Mr. Burks³ told everyone that morning to go to work. Mr. Gilkey testified he was in the job shack when he heard claimant yell something like, "Oh, shit."⁴ He ran to where claimant had landed and observed claimant shaking as if he was having a seizure.

² All dates are in 2015, unless otherwise indicated.

³ All references to Mr. Burks are references to Freddy Burks.

⁴ P.H. Trans. at 13.

Al Wheeler, an investigator from the insurance carrier, interviewed Mr. Gilkey on August 17. Mr. Gilkey acknowledged telling Mr. Wheeler about seeing claimant fall backwards from the ladder and when he ran over, claimant was having a seizure. Mr. Gilkey indicated he did not tell Mr. Wheeler that claimant said something before falling because Mr. Wheeler never asked.

Respondent's attorney interviewed claimant on October 21 and prepared a written statement that Mr. Gilkey signed and dated. The statement indicated Mr. Gilkey did not hear claimant make any noise or yell anything and that claimant was not moving as he fell. Mr. Gilkey testified he was not asked by respondent's attorney if he heard claimant say anything when he fell. Mr. Gilkey also testified he told respondent's attorney that claimant was saying something as he was coming off the ladder.

Mr. Burks testified he is respondent's acting manager. Mr. Burks was aware claimant had seizures and indicated he had seizures while working for respondent. According to Mr. Burks, respondent had no firm policy with regard to claimant's seizures; "We just sort of have the idea we prefer not to have him on a ladder."⁵ Mr. Burks indicated there were occasions when claimant was put on a ladder because the job needed to get done. Mr. Burks indicated he had no reason to doubt his father spoke to Mr. Gilkey about not wanting claimant on ladders.

According to Mr. Burks, on the day of the accident, he did not instruct claimant to get on the ladder and work. When claimant fell, Mr. Burks was inside the house near an open window. He heard a thud and Mr. Gilkey say, "Oh, my God."⁶ Mr. Burks did not hear claimant say anything before hearing the thud. Mr. Burks stepped out the window and ran to where claimant fell. When he arrived, claimant was unconscious. Mr. Gilkey was at the scene and another employee, Robert, was arriving at the scene. They held claimant and tried to keep him from convulsing badly. Mr. Burks reasoned that because claimant was convulsing on the ground, he must have had an epileptic seizure while on the ladder.

Respondent introduced the transcripts of two August 11 recorded conversations between claimant and an unknown person purported to be an insurance adjustor. Claimant was in the hospital, on medications, at the time he was interviewed and did not remember the conversations. In the first conversation, claimant was asked about what happened while he was on the ladder and about his epilepsy. Claimant related how he ran out of money for his anti-seizure medication and had not taken a dose for two days prior to the accident. Claimant stated, "I, I'm guessing that I had the seizure and it, you know,

⁵ *Id.* at 70.

⁶ *Id.* at 74.

INAUDIBLE fell.”⁷ He stated he was doped up and arrangements were made to call him back later that day.

During the second recorded conversation on August 11, claimant stated, “. . . I was just going to work and climbed up a ladder, was sitting there working on the window, and the next thing you know, you know, I’m wa- . . . I’m waking up on the ground with everybody around me.”⁸

While at the hospital, claimant was interviewed by Mr. Wheeler on August 17. Claimant told Mr. Wheeler he slipped on one of the ladder rungs and fell. Claimant stated he had not taken Depakote for about a week before the accident. He indicated there were times he had gone without his medications for a few months and not had a seizure.

The transcript of Mr. Wheeler’s August 17 interview with Mr. Gilkey was placed into evidence. Mr. Gilkey stated he was coming out of a trailer when he saw claimant fall. He immediately ran to where claimant fell and saw claimant was having a seizure. The seizure went on for five or six minutes. When the seizure ended, claimant yelled his back was hurting. Mr. Wheeler did not ask if claimant yelled or made any noise when he fell.

A transcript of Mr. Wheeler’s August 17 interview with Robert Lester, claimant’s co-worker, was placed into the record. The transcript indicates Mr. Lester heard Mr. Gilkey’s voice; heard, but did not see, claimant hit the ground and saw claimant lying on the ground after he fell. Mr. Lester stated claimant “. . . was laying there on the ground he was still in the seizures, after he hit he was still having a seizure.”⁹

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁰ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”¹¹

⁷ *Id.*, Resp. Ex. 1 at 5.

⁸ *Id.*, Resp. Ex. 2 at 7.

⁹ *Id.*, Resp. Ex. 5 at 4.

¹⁰ K.S.A. 2014 Supp. 44-501b(c).

¹¹ K.S.A. 2014 Supp. 44-508(h).

K.S.A. 2014 Supp. 44-508(f)(3), in part, states:

(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

This case turns on the facts. If claimant slipped on the ladder rung and fell, he clearly sustained a personal injury by accident arising out of and in the course of his employment. If he fell because he had an epileptic seizure, a personal condition, his accident did not arise out of and in the course of his employment, per *Hurtado*.¹² Respondent contends claimant is not being truthful and his motivation for lying includes his severe injury, inability to work and provide for his family and his medical bills. Respondent alleges Mr. Gilkey lied because of his friendship with claimant.

Claimant contends he slipped on a ladder rung and fell. Claimant maintains he told the insurance adjustor on August 11 that he guessed he had a seizure and then fell. Claimant points to the fact that when he was interviewed, he was in the hospital on heavy medications. Claimant's testimony that he remembered falling from the ladder and his statement to Mr. Wheeler that he slipped on a ladder rung are credible and convincing.

Some aspects of statements Mr. Gilkey made to Mr. Wheeler and respondent's counsel are inconsistent with his testimony. In particular, Mr. Gilkey signed a statement for respondent's attorney stating he did not hear claimant say anything while falling, but testified otherwise. However, Mr. Gilkey consistently maintained he saw claimant fall and that when he reached claimant, he was having a seizure.

This is a close case. There are facts that support the contentions of both parties. This Board Member is well aware of claimant's and Mr. Gilkey's motivations. However, their purported motivations do not necessarily make them untruthful. The ALJ had the opportunity to assess the testimony of claimant, Mr. Gilkey and Mr. Burks. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility

¹² *Hurtado v. I & A Painting and Remodeling*, No. 1,058,894, 2015 WL 9672641 (Kan. WCAB Dec. 22, 2015).

where the ALJ personally observed the testimony. This Board Member affirms the Order of the ALJ.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁴

WHEREFORE, the undersigned Board Member affirms the February 10, 2016, preliminary hearing Order entered by ALJ Jones.

IT IS SO ORDERED.

Dated this ____ day of April 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Gary K. Jones, Administrative Law Judge

¹³ K.S.A. 2014 Supp. 44-534a.

¹⁴ K.S.A. 2014 Supp. 44-555c(j).